

**LETTER OPINION**  
**80-56**

March 28, 1980 (OPINION)

Mr. Byron Knutson  
Insurance Commissioner  
State Capitol  
Bismarck, North Dakota 58505

Dear Commissioner Knutson:

This is in response to your letter of March 12, 1980, wherein you request an opinion approving certain proposed rules and regulations of the North Dakota Insurance Department as the same pertains to Unfair Practices Regulation. The proposed rules cite as general authority sections 26-01-16, 28-32-02, and 26-30-04.1 of the North Dakota Century Code, which said authority is relied upon for the implementation of section 26-30-04(7) of the North Dakota Century Code.

Section 26-01-16 provides as follows:

26-01-16. APPEAL FROM COMMISSIONER'S DECISION. Any order or decision of the insurance commissioner, unless otherwise specifically provided for by law, shall be subject to review or appeal in the courts of this state, in the manner provided by chapter 28-32.

Section 28-32-02 provides as follows, in part, as pertinent to the rulemaking authority of an administrative agency:

28-32-02. RULEMAKING POWER OF AGENCY. Every administrative agency shall have the authority to promulgate, and from time to time to amend or repeal, reasonable rules and regulations in conformity with the provisions of any statute administered or to be administered, enforced or to be enforced, by such agency, and to prescribe methods and procedure required in connection therewith. Prior to the adoption, amendment, or repeal of any rule, the agency shall: (Emphasis supplied).

Section 26-30-04.1 provides as follows:

26-30-04.1. REGULATIONS. The commissioner may, from time to time, promulgate reasonable rules and regulations, as are necessary to identify specific methods of competition and acts or practices which are prohibited by section 26-30-04; provided, however, such regulations shall not enlarge upon or extend the provisions thereof, and such rules and regulations shall be subject to review in accordance with chapter 28-32. (Emphasis supplied).

In seeking to find the legislative authority for the substantive provisions of the proposed rules and regulations, we would note that section 26-01-16 merely refers to appeals from decisions of the commissioner and would have no application to the regulations under

consideration. Section 28-32-02 provides for the authority to promulgate, amend, or repeal rules and regulations "in conformity with the provisions of any statute administered or to be administered, enforced or to be enforced, \* \* \*." This provision clearly requires a specific or particular statute to be administered or enforced. Such statute would also require specific authority prescribing limitations. We can then only look to the statute providing for regulations governing specific methods of competition and acts or practices which are prohibited by section 26-30-04, i.e., section 26-30-04.1, which provides specifically that "such regulations shall not enlarge upon or extend the provisions."

Looking to section 26-30-04(7), the statute governing unfair discrimination, which provision the proposed regulations are attempting to qualify, we note that the same provides as follows:

7. Unfair discrimination. (a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

(b) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever. (Emphasis supplied).

It is noted that in both instances, (a) governing life insurance and (b) governing accident and health insurance, the prohibition is against "any unfair discrimination between individuals of the same class \* \* \*." There is no prohibition of different classes identified by insurance companies based upon actuarial statistics. The proposed regulation would appear to infringe upon the right of an insurance company to establish a particular class not otherwise prohibited by statute.

With regard to insuring such risks or the refusal to insure such risks, it must be noted that the provision relating to such refusal is found in section 26-30-04(11) which provides as follows:

Refusing to insure risks. Refusing to insure risks solely because of race, color, creed, sex, or national origin.

The proposed regulation enlarges the scope of the statute beyond those factors specifically stated therein.

Accordingly, we fail to find legislative authority for the substantive provisions of the proposed rules and regulations, resulting in the elimination of a class without legislative provision therefor.

Upon review of the statutes relied upon as cited in the proposed rules and regulations and upon other statutes, it is considered that

the Insurance Commissioner is lacking in delegated authority to adopt these proposed rules and regulations; that these proposed rules and regulations are contrary to legislative authority and the intent of chapter 26-30 of the North Dakota Century Code; and that they are therefore a usurpation of legislative authority and would be found void and of no legal effect by a court of competent jurisdiction.

The proposed regulations, which you have submitted as chapter 45-06-01, for publication in the North Dakota Administrative Code, are herewith returned unapproved for your review and consideration in light of our determination thereon.

Sincerely,

ALLEN I. OLSON

Attorney General